COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1239-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE BLODGETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions.*

WEDEMEYER, P.J.[1] Bruce Blodgett appeals from a judgment of conviction for driving while under the influence of an intoxicant, third offense, contrary to §§ 346.63(1)(a) and 346.65(2), STATS. He also appeals from a

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

postconviction order denying his motion for a new trial. He claims the trial court erred in allowing the jury to hear evidence of his two prior OWI convictions despite his stipulation to this element of the charged offense. Blodgett further claims that this error contributed to his conviction. Because (1) it was error for the trial court to allow the jury to hear this evidence, (2) the error was not harmless, and (3) Blodgett did not waive this issue when he testified at trial, this court reverses the conviction and remands this matter back to the trial court with instructions.

I. BACKGROUND

On the night of August 3, 1996, Wauwatosa Police Officer James Short stopped the vehicle Blodgett was driving after observing it cross the center line and "jerk" back into its lane a number of times. Approaching the vehicle, Officer Short noticed that Blodgett smelled of alcohol. When asked whether he had been drinking, Blodgett admitted that he "had a few" that evening, although he denied being impaired. Officer Short had Blodgett exit the vehicle and perform three sobriety tests.

Blodgett performed unsatisfactorily on two of the three tests. When reciting the alphabet, he made it only to "Q." When performing the "finger-to-nose" test, Blodgett touched the bridge of his nose with the left hand and his mustache with the right. He did, however, perform the "heel-to-toe" walk successfully. Citing his sluggishness, slurred speech, and marginal performance on the sobriety tests, Officer Short arrested Blodgett. An Intoxilyzer test subsequently revealed a blood-alcohol concentration of .08.

Blodgett tried his case to a jury on January 2 and 3, 1997, for the charge of driving under the influence of an intoxicant, third offense. Prior to trial,

he offered a stipulation to the two previous offenses which would prohibit the State from introducing any evidence regarding these prior convictions. The State agreed to the stipulation and it was approved by the trial court.

The State, however, reopened the issue of the stipulation on the second day of trial. Based on evidence presented by the State pertaining to the prior convictions, the trial court reversed its ruling. Evidence regarding his prior convictions was admitted and Blodgett was subsequently convicted of the offense of OWI, third offense.

Blodgett filed a motion for a new trial. He based this motion on the decision in ***Old Chief v. United States***, 519 U.S. ___, 117 S.Ct. 644 (1997), in which the United States Supreme Court found that introducing evidence of a defendant's prior offenses, in spite of his offer to stipulate to them, constituted undue prejudice. The trial court denied this motion.[2] Blodgett now appeals from this conviction and from the postconviction order denying him a new trial.

II. ANALYSIS

A court may exclude relevant evidence if its probative value is outweighed by the risk of unfair prejudice that could result from its admission. *See* § 904.03, STATS. It is, therefore, left to the trial court's discretion whether to admit such evidence. *See* ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172,

[2] In making this decision, the trial court relied on ***State v. Ludeking***, 195 Wis.2d 132, 536 N.W.2d 392 (Ct. App. 1995), in which the defendant, charged with the identical crime, appealed his conviction after the trial court denied his motion in limine to prevent the State from introducing evidence of two prior OWI convictions. The defendant argued that the two prior convictions were not an element of the charged offense. The appellate court upheld his conviction, finding that the prior offenses were an element of the charged offense and it was proper for the State to introduce the evidence.

174 (Ct. App. 1993). Decisions within the discretion of the trial court will be reversed only when the court erroneously exercises its discretion. *See* ***State v. Ross***, 203 Wis.2d 66, 80, 552 N.W.2d 428, 433 (Ct. App. 1996).

The Wisconsin Supreme Court's decision in ***State v. Alexander***, 214 Wis.2d 627, 571 N.W.2d 662 (1997),[3] settles the question of whether admitting the evidence of Blodgett's prior OWI convictions at trial was error. Admitting such evidence "raises an inference that the defendant has a bad character and a propensity to drink and drive, and that is the very result prohibited by the rules of evidence." ***Alexander***, 214 Wis.2d at 649, 571 N.W.2d at 671. Based on ***Alexander***, and the State's failure to challenge this issue in its reply brief, this court concludes that the trial court erred in allowing evidence pertaining to Blodgett's past convictions to be heard by the jury.

The issues before this court, therefore, are (1) whether this error by the trial court constituted harmless error, and (2) whether Blodgett waived his right to a prejudicial error claim by testifying about residual mouth alcohol at trial. This court first addresses the waiver issue.

On direct examination, Blodgett referred to residual mouth alcohol when answering questions about his Intoxilyzer test. It is apparent that this line of questioning by his lawyer was intended to raise an inference in the minds of the jury that the result of the test may have been flawed. The State, on cross-

[3] ***Alexander***, a case with facts substantially similar to the instant case, makes it error for a trial court to allow evidence of a defendant's prior convictions to be heard by the jury when the defendant offers to stipulate to this element of the offense. The Court in ***Alexander*** followed the decision of the United States Supreme Court in ***Old Chief v. United States***, 519 U.S. ___, 117 S.Ct. 644 (1997). Additionally, ***Alexander*** overruled that portion of ***Ludeking*** relied on by the trial court in denying Blodgett's motion for a new trial. ***Alexander***, 214 Wis.2d at 651, 571 N.W.2d at 671.

examination, had a right to question Blodgett on this issue as well. *See* ***Sprague v. State***, 188 Wis. 432, 206 N.W. 69 (1925).

The State's questions pertaining to his knowledge of residual mouth alcohol arguably were aimed at "steering" Blodgett into revealing his past convictions. However, Blodgett's answer of "from a previous offense" when asked for the third time by the State where he learned of residual mouth alcohol does not serve as a waiver of Blodgett's right to raise this issue.

"From a previous offense" is too vague a statement to be said to invoke the idea that the offense was drunk driving. "Previous offense," in this context, could be interpreted to refer to offenses such as disorderly conduct or assault. Blodgett, therefore, did not "open the door" to the presentation of evidence of past drunk driving offenses and his claim for undue prejudice is preserved. This court now turns to the issue of harmless error.

When determining whether a trial court error is harmless, a court must determine if there is a reasonable probability that it contributed to the conviction. *See* ***Alexander***, 214 Wis.2d at 651-52, 571 N.W.2d at 671. The State, as the beneficiary of the error, has the burden of showing that the error was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231 (1985).

In ***Alexander***, the court found the error harmless because the evidence against the defendant was "overwhelming." *See* ***Alexander***, 214 Wis.2d at 652-53, 571 N.W.2d at 672. Alexander had a blood-alcohol concentration of .24. *See* ***id.*** Before being pulled over, he struck a curb and almost hit the officer's squad car. *See* ***id.*** When speaking to the arresting officer, Alexander could not remember where he was coming from. *See* ***id.*** Additionally, he failed all three sobriety tests and admitted being under the influence of alcohol. *See* ***id.*** The court

in ***Alexander*** concluded that the defendant would have been convicted whether or not the evidence of prior offenses was introduced. This court is not able to so conclude in this case.

Although there are similarities between the circumstances in ***Alexander*** and this case, they are not strong enough to conclude that the trial court's error did not contribute to Blodgett's conviction. The facts in this case do not suggest an "overwhelming" amount of evidence against Blodgett. He registered a .08 on the Intoxilyzer, one-third the level of the defendant in ***Alexander***. Further, Blodgett denied being under the influence of alcohol and actually passed one sobriety test. While Blodgett's erratic driving, blood-alcohol concentration, and marginal performance on the sobriety tests certainly sets forth a prima facie case for the prosecution, they do not convince this court that there was no reasonable possibility that the admission of evidence of Blodgett's prior offenses contributed to his conviction. Thus, the error was not harmless. This court reverses Blodgett's conviction and remands this matter with directions that Blodgett receive a new trial where the challenged evidence is excluded.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.